No. 15492

United States
Court of Appeals
For the Ninth Circuit

FRANCES CARDINALE, ANN F. CARDINALE, HORACE A. CARDINALE and FRANK J. CARDINALE, Minors, by FRANCES CARDINALE, Their Guardian, Ad Litem,

Appellants,

vs.

UNION OIL COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-17-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MORGAN & BEAUZAY and
MORTON L. SILVERS,
906 Commercial Building,
San Jose, California,

Proctors for Libelant and Appellant.

FREDERIC C. NAVE,
350 Sansome Street,
San Francisco, California,

Proctor for Respondent and Appellee.

In the District Court of the United States, Northern District of California, Southern Division

No. 27098 in Admiralty

FRANCES CARDINALE, ANN F. CARDINALE, HORACE A. CARDINALE, and FRANK J. CARDINALE, Minors, by FRANCES CARDINALE, Their Guardian, Ad Litem,

Libelants,

vs.

UNION OIL COMPANY, FIRST DOE, SECOND DOE, THIRD DOE, BLACK & WHITE COMPANY, a Copartnership; RED & WHITE COMPANY, a Corporation,

Respondents.

LIBEL IN PERSONAM

I.

That libelant, Frances Cardinale, was appointed by the above-entitled Court as, and now is, the guardian, ad litem, of libelants, Ann F. Cardinale, age thirteen (13); Horace A. Cardinale, age eleven (11), and Frank J. Cardinale, age three (3), minors.

II.

That libelant, Frances Cardinale, is the mother of said minors, and that said minors are the children of Frances Cardinale and Frank Cardinale; that said Frank Cardinale died on or about Sep-

tember 28, 1954; that libelants are the only heirs at law of said Frank Cardinale.

III.

That the death of Frank Cardinale occurred aboard the Santa Lucia, a vessel on navigable waters, and this Court has jurisdiction of this cause pursuant to the provisions of 46 U.S.C. 740.

IV.

That this action is brought pursuant to the terms and provisions of Section 377 of the Code of Civil Procedure of the State of California.

V.

That respondent Union Oil Company is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

VI.

That at all times herein mentioned respondents First Doe and Second Doe were the agents and employees of respondent Union Oil Company and were engaged in the course and scope of said agency and employment.

VII.

That the true names of respondents First Doe, Second Doe, Third Doe, Black & White Company, a copartnership, and Red & White Company, a corporation, are unknown to libelants, who therefore sue said respondents by said fictitious names, and pray leave of Court to amend this libel to show the

true names and capacities of said respondents when these have been ascertained.

VIII.

That on or about September 28, 1954, at Avila, California, respondents negligently maintained, inspected, operated and controlled the gas fueling equipment and dock there located, said dock, according to libelants' information and belief, being known as the Union Oil Company dock at Avila, California; negligently fueled, and supervised the fueling of the Santa Lucia, of which vessel said Frank Cardinale was part owner and engineer, while said vessel was moored to said dock; negligently failed to observe, watch and control the quantity of gasoline pumped aboard said vessel from the Union Oil Company gasoline pump located on said dock; negligently and carelessly permitted more gasoline to be pumped aboard said vessel than was ordered or the vessel's gasoline tank would hold; negligently permitted the Santa Lucia to dock and be moored in an area where a dangerous accumulation of vapors and gaseous fuel existed; and negligently and carelessly failed to warn the crew or master of the Santa Lucia of said accumulation.

IX.

That as a direct and proximate result of the aforesaid negligence, an explosion occurred aboard the Santa Lucia, proximately causing the death of said Frank Cardinale; that by reason of the death of

Frank Cardinale libelants have been generally damaged in the sum of $150,000.00.

Wherefore, libelants pray that citations in due form of law may issue against the respondents herein, citing them to appear and answer in the premises; that this Court decree the payment by said respondents to the libelants of the sum of $150,000.00, together with interests and costs; and that libelants may have such other and further relief as may be just.

/s/ MORTON L. SILVERS,

MORGAN & BEAUZAY,
Proctors for Libelants.

Duly verified.

[Endorsed]: Filed April 4, 1955.

[Title of District Court and Cause.]

PETITION FOR APPOINTMENT OF GUARDIAN, AD LITEM, AND EMPLOYMENT OF ATTORNEYS AND PROCTORS AND ORDER APPOINTING GUARDIAN, AD LITEM

Petitioner Alleges:

I.

Petitioner is a resident of the City of Pacific Grove, Monterey County, California, and is the mother of Ann F. Cardinale, aged thirteen (13);

Horace A. Cardinale, aged eleven (11), and Frank J. Cardinale, aged three (3), who reside with petitioner at Pacific Grove, California; that said minors have no general or testamentary guardian.

II.

Said minors have a cause of action against Union Oil Company and the respondents named herein by their fictitious names, as the heirs of Frank Cardinale, their father, who died on September 28, 1954, due to the negligence and carelessness of respondents; that said minors' best interest requires that they bring an action in this court for the wrongful death of their father.

III.

Petitioner is a competent and responsible person qualified to act as the guardian, ad litem, of said minors in said action; that no previous application for an appointment of a guardian, ad litem, in this action has been made.

IV.

That said minors and petitioners are without funds to prosecute the within action and petitioner prays for authority to employ Morton L. Silvers and Morgan & Beauzay as her attorneys and proctors in admiralty on the basis of the following contingent fee schedule, to wit: One-third if settled without trial, four-tenths if tried, and one-half if appealed.

Wherefore, petitioner prays she be appointed guardian, ad litem, for said minors and she be

authorized to employ said attorneys and proctors on the aforesaid contingent fee basis to prosecute such action.

/s/ FRANCES CARDINALE,
Petitioner.

/s/ MORTON L. SILVERS,

MORGAN & BEAUZAY,

By /s/ ROBERT MORGAN,
Attorneys and Proctors for
Petitioner.

Duly verified.

Order

Frances Cardinale is hereby appointed guardian, ad litem, of Ann F. Cardinale, Horace A. Cardinale and Frank J. Cardinale, and is authorized to employ Morton L. Silvers and Morgan & Beauzay as attorneys and proctors on the terms set forth in her Petition for Appointment of Guardian, Ad Litem, and Employment of Attorneys.

Dated: April 4, 1955.

/s/ O. D. HAMLIN,
Judge of the District Court.

[Endorsed]: Filed April 4, 1955.

[Title of District Court and Cause.]

ANSWER TO LIBEL IN PERSONAM

Comes now the respondent, Union Oil Company, and answering Libelants' Libel in Personam on file herein, admits, denies and alleges as follows:

I.

Answering Paragraphs I, II, III and VI, said respondent alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained and placing its denial on that ground, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

II.

Answering Paragraphs VIII and IX, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

Denies that Libelants, Frances Cardinale, Ann F. Cardinale, Horace A. Cardinale and Frank J. Cardinale, have been damaged in the sum of $150,000.00 or any other sum or sums whatsoever or at all.

Further Answering Said Libel in Personam, and as and for a separate and distinct defense thereto and plea of contributory negligence, said respondent alleges that Libelant, Frank Cardinale, was negligent and careless in and about the matters set forth in said Libel in Personam in the following manner, to wit: That at said time and place Libelant, Frank Cardinale, failed to use due or any care or caution

for the protection of his own safety; that said acts of carelessness and negligence on his part proximately caused or contributed to the damage sustained or injury sustained.

Wherefore, said respondent prays that libelants take nothing by their action and that said respondent be hence dismissed with its costs herein incurred.

BOYD & TAYLOR,

/s/ FREDERIC G. NAVE,
Proctors for Respondent,
Union Oil Company.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 14, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Roche, Chief Judge:

This case involves the death of Frank Cardinale, occurring on navigable waters aboard the vessel Santa Lucia. This court has jurisdiction of this cause pursuant to 40 U.S.C., § 740.

The facts of this case are as follows: On September 28, 1954, shortly before 5:30 p.m. the fishing boat, Santa Lucia, came into the Union Oil dock at Avila, California, in order to take aboard gasoline. As the Santa Lucia came into the Union Oil dock,

the tanker Lompoc, which was standing at least two hundred to two hundred fifty feet away, was finishing the loading of almost one and one-half million gallons of Orcutt enriched crude, which it had been loading for some six and one-half hours before the appearance of the Santa Lucia. This fuel, Orcutt, is highly volatile, containing approximately seventeen per cent natural gasoline.

The dock attendant passed the gasoline hose down to the boat, Santa Lucia, which was standing fifteen feet below the dock, and opened the valves at the meter allowing gasoline to flow into the gasoline lines. As decedent took the hose the dock attendant asked him approximately how much gasoline he would need. Decedent replied about thirty (30) gallons. Decedent then placed the nozzle (spring loaded passed to him, of the flow of gasoline into the tank. which opening was flush with the deck, and commenced the fueling operation. The gasoline tank, itself, was located under the deck, held there by hangars, and could only be seen by someone below decks. Decedent had complete control, once the hose was passed to him, of the flow of gasoline into the tank. As there was a shut off at the end of the hose, decedent could have stopped the flow of gasoline at any time. The meter which measured the flow of gasoline stood approximately twenty-six inches high above the floor of the dock, and was located six feet back and from the edge of the dock, where it could not be seen by decedent in the boat, located as it was, below the dock. It is uncontroverted that a

meter reading taken some time later indicated that fifty-eight gallons of gasoline had been delivered out of the storage tanks on the dock. The fishing vessel's gasoline tank had a maximum capacity of about forty gallons. It was also uncontroverted that no gasoline spilled on the deck of the Santa Lucia, showing that decedent had not carelessly allowed the tank to overfill. About one and one-half hours before the Santa Lucia commenced fueling, a complete inspection of the boat for insurance purposes had been made by Captain Hansen, an experienced marine surveyor. It was Captain Hansen's opinion at the time that the fishing boat was seaworthy and that its gas tank was in sound condition. Some time after fueling commenced, as a result of gasoline vapors which had collected in the hold of the fishing boat, an explosion and fire ensued causing the death of Frank Cardinale.

Libelants have set forth several theories in their libel by which they place responsibility for the explosion and fire on respondents. Said libel reads in part as follows:

"That on or about September 28, 1954 * * * respondents negligently maintained, inspected, operated and controlled the gas fueling equipment and dock * * * known as the Union Oil Company dock at Avila, California; negligently fueled, and supervised the fueling of the Santa Lucia, of which vessel Frank Cardinale was part owner and engineer, while said vessel was moored to said dock; negligently failed to observe, watch and control the quan-

tity of gasoline pumped aboard said vessel from the Union Oil Company gasoline pump located on said dock; negligently and carelessly permitted more gasoline to be pumped aboard said vessel than was ordered or the vessel's gasoline tank would hold; negligently permitted the Santa Lucia to dock and be moored in an area where a dangerous accumulation of vapors and gasoline fuel existed; and negligently and carelessly failed to warn the crew or master of the Santa Lucia of said accumulation."

The libelants have the burden of proving negligence on the part of the respondents. It has been submitted by both counsel for libelants and respondents that one of two things occurred causing this catastrophe. Either the equipment on the dock was defective, or the gasoline tank on the fishing vessel was defective; and that this defect resulted in the liberation of gasoline which caused the fatal sequence of events. There is no direct evidence supporting either of these theories. No witness testified to having observed gasoline spilling on the dock, nor did any witness testify to having observed the fishing boat's gas tank leaking at the time gasoline was being taken aboard.

If libelants' theory is the correct one, that the defect existed on the dock, then it would require the court to believe that twenty to thirty gallons of gasoline spilled out on the Union Oil dock in the vicinity of the meter, and that although a number of people were in the area not one detected the presence of gasoline. In view of the physical facts this seems highly improbable. It would mean that the

dock attendant, the three men who were aboard the tug Avila some forty (40) feet away or less, and the men who were on the fishing boat, all failed to detect the large quantity of fuel that would have spilled out on the dock.

Following the explosion and fire an inspection was made of the fueling equipment on the dock and nothing was found wrong either in the gasoline storage tank or the lines that run from the tank to the meter, which meter is six feet away from the edge of the dock. The gasoline storage tank itself was not ruptured or blown up, and the gasoline that was in the storage tank was salvaged and used later. All of the pipes, all of the connections running from the gasoline storage tank to the meter were determined to be sound. Therefore, if approximately thirty gallons of gasoline was dumped on the dock, it had to be spilled past the meter or in the area of the meter some six feet from the edge of the wharf. As stated previously, no witness testified either to having seen or smelled the spillage.

The photographs placed in evidence reveal that there had to be a tremendous underwater explosion aboard the fishing boat. In order to have an explosion of the type pictured, there had to be and was of necessity a quantity of gasoline vapor within the boat itself. Under the theory of libelants' case, those vapors were sucked into the boat from the Lompoc, which was fueling in the neighborhood of the Santa Lucia, and/or from the gasoline allegedly spilled

out on the dock. The witnesses who were experts in their fields, and the literature on the subject of the toxic effect of fumes, manifest an absolute impossibility that fumes from the Lompoc could have had a causal connection contributing to the explosion. It is significant that of the witnesses who were in the immediate area, not one, either from the Lompoc, or the Santa Lucia, or the tug Avila, testified as to having experienced any personal discomfiture whatsoever, or of noticing any unusual concentration of fumes or smell of petroleum products on the day in question. It is the court's conclusion that the evidence failed to show that the Lompoc's fueling had any causal relationship with the explosion and fire.

Testimony was given in this case by Captain Hansen, a Coast Guard licensing examiner, who had checked over the boat about 90 minutes before the fire and explosion. The broker who wrote insurance for the fishing boat was aboard the fishing boat with this witness. The captain testified that on a prior inspection, about a year before this accident, he found the fishing boat to be in poor housekeeping condition, wiring in poor condition, and generally filthy and dirty. As to his inspection of the gasoline tank on the day of the explosion and fire, the witness said that his test consisted of running his hand over the tank and feeling the valves. He stated that he did not know of what material the tank was made of, nor its capacity, and that he did not pressure test the tank. On the basis of this inspection the Captain testified that in his opinion the tank was

sound. The court does not attach great weight to this witness' testimony. As far as the record reveals, nothing having been established to the contrary, both the gasoline tank on the boat, and the equipment on the dock were all in proper working condition up until the time this accident took place. The crucial point is, what was the condition of this equipment during the moments that the gasoline escaped? Was the gasoline tank on the boat leaking, or was the equipment on the dock defective in some way? As to these points the record is silent.

A number of witnesses testified in this case regarding what they saw take place on the fateful day of the explosion. The court must conclude that the substance of their testimony did not sustain the burden that libelants must carry in this case. See Weaver v. Shell Company of Cal. (1936), 13 C.A. 2d 643; and Weaver v. Shell Oil Company of California (1939), 34 C.A. 2d 713. As in the case of Weaver v. Shell Oil Co. of Cal. (1936), 13 Cal. App. 2d 643, the facts adduced at the trial show no more reason for inferring that the accident occurred through the negligence of respondents than it did through the negligence of the fishing boat. Speculation cannot take the place of evidence, and if the court were called upon to make findings in favor of libelants in the instant case it could not do so. Respondents have produced evidence which in the court's view is consistent with the premise that the explosion and fire resulted from a defective condition of the gasoline tank aboard the Santa Lucia.

Libelants have failed to sustain the burden of proving otherwise by a preponderance of the evidence.

In accord with the foregoing,

It Is Ordered That a decree be entered herein upon findings of fact and conclusions of law in favor of respondents, and against libelants. The respective parties to pay their own costs.

Dated: January 12th, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District Court.

[Endorsed]: Filed January 12, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause coming on for trial on the 30th day of November, 1955, before the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury; Morton L. Silvers, and Robert Morgan of Morgan and Beauzay, appearing as proctors for Libelants, Frances Cardinale, et al., and M. K. Taylor and Frederic G. Nave, of Boyd & Taylor, appearing as proctors of Respondent, Union Oil Company of California, a corporation; and the court having heard the testi-

mony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision and the court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

1. On September 28, 1954, shortly before 5:30 o'clock p.m. the fishing boat Santa Lucia came into the Union Oil Dock at Avila, California, in order to take aboard gasoline.

2. That as the fishing boat Santa Lucia came into the Union Oil Dock, the tanker "Lompoc," which was standing at least two hundred to two hundred fifty feet away, was finishing the loading of almost one and one-half million gallons of Orcutt enriched crude oil, which it had been loading for some six and one-half hours before the appearance of the Santa Lucia. This fuel, Orcutt, is highly volatile, containing approximately seventeen per cent natural gasoline.

3. The dock attendant, an employee of the respondent, Union Oil Company, passed a gasoline hose down to the fishing boat Santa Lucia, which was standing approximately fifteen feet below the dock, and opened the valves at the meter allowing gasoline to flow into the gasoline lines. As decedent took the hose, the dock attendant asked him approximately how much gasoline he would need. Decedent replied about thirty (30) gallons. Decedent

then placed the nozzle into the fill opening of the gasoline tank, which opening was flush with the deck, and commenced fueling operations. The nozzle of the gasoline hose was a spring located type and so constructed that to permit the flow of gasoline through the nozzle a lever was opened by manual pressure and to stop the flow the lever was merely released.

4. That the gasoline tank aboard the fishing boat Santa Lucia was located under the deck, held there by hangars, and could only be seen by someone below decks. That decedent had complete control, once the hose was passed to him, of the flow of gasoline into the tank. As there was a shut off at the end of the hose, decedent could have stopped the flow of gasoline at any time.

There was a meter which measured the flow of gasoline, which stood approximately twenty-six inches high above the floor of the dock, and was located six feet back from the edge of the dock, where it could not be seen by decedent in the boat, located as it was, below the dock. A meter reading taken some time later indicated that fifty-eight gallons of gasoline had been delivered out of the storage tanks on the dock.

6. The fishing vessel's gasoline tank had a maximum capacity of about forty gallons. No gasoline spilled on the dock of the fishing boat Santa Lucia showing that decedent had not allowed the tank to overfill.

7. Approximately one and one-half hours before the Santa Lucia commenced fueling an inspection of the boat for insurance purposes had been made by a Captain Hansen, an experienced marine surveyor. It was his opinion that at the time of his inspection the fishing boat was seaworthy and that its gas tank was in sound condition. That on a prior inspection, approximately one year before the accident, Captain Hansen found and reported the fishing boat to be in poor housekeeping, the wiring in poor condition and the boat to be generally filthy and dirty. The same general conditions were found to exist when Captain Hansen again inspected the boat on or about the 10th day of September, 1954, or within a few weeks prior to the accident. At no time did Captain Hansen make any examinations of the gas tank other than running his hand over the top of the tank and feeling the valves. He did not know of what material the tank was made, nor its capacity, and he did not run any pressure test on the tank.

8. That gasoline vapors accumulated in the hold of the fishing boat resulting in a tremendous underwater explosion aboard the fishing boat. That the explosion and fire resulted from a defective condition of the gasoline tank of the fishing boat Santa Lucia.

9. That there was no causal relationship between the fueling of the tanker "Lompoc" and the explosion and fire aboard the fishing boat Santa Lucia or the following fire on the marine service dock.

10. That the fueling equipment on the dock was not defective. Nor was there any defect in the gasoline storage tank on the dock or the lines that run from the tank to the meter. The gasoline storage tank itself was not ruptured or blown up, and the gasoline that was in the storage tank itself was salvaged and used later. All of the pipes and connections running from the gasoline storage tank to the meter were determined to be sound.

From the foregoing facts the court concludes as follows:

Conclusions of Law

1. Libelants have failed to produce sufficient evidence against the respondents that they were responsible for the explosion and fire resulting in the death of decedent.

2. That Libelants have failed to produce any evidence showing any causal relationship between the fueling of the tanker "Lompoc" and the explosion and fire aboard the fishing boat Santa Lucia.

3. That from the evidence in this case the inferences of negligence is such that the court finds as a matter of law that the explosion and fire resulted from a defective condition of the gasoline tank aboard the fishing boat Santa Lucia.

4. That Libelants have failed to sustain the burden of proof that the death of decedent was due to any negligence or omission on the part of the respondents.

5. That Libelants have not proven the allegations of their Libel or their several theories set forth therein.

6. That Libelants are not entitled to recover any damages from the respondents herein upon their Libel filed herein.

7. That judgment be entered herein, upon these findings of fact and conclusions of law for the respondent.

8. That each party pay their own costs in this action incurred.

Dated: This 30th day of January, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, United States
District Court.

Receipt of copy acknowledged.

Affidavit of Service by Mail attached.

Lodged January 17, 1956.

[Endorsed]: Filed January 30, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 27098

FRANCES CARDINALE, et al.,

Libelants,

vs.

UNION OIL COMPANY OF CALIFORNIA, a Corporation, et al.,

Respondents.

JUDGMENT ON FINDINGS OF COURT FOR DEFENDANT

The above cause came on for trial on the 30th day of November, 1955, and was duly submitted for consideration and decision, and the Court, after due deliberation rendered its decision, and on the 30th day of January, 1956, made and filed its findings of fact, conclusions of law, and order for judgment.

Now, Therefore, pursuant thereto, it is determined by the Court that Libelants take nothing by this action and that each party bear its own costs.

Dated: This 30th day of January, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, United States
District Court.

Lodged January 17, 1956.

[Endorsed]: Filed January 30, 1956.

[Title of District Court and Cause.]

OBJECTIONS AND AMENDMENTS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND PROPOSED COUNTER FINDINGS AND CONCLUSIONS OF LAW

Come Now the Libelants and Object to the Following Proposed Findings of Fact:

1. That portion of paragraph 4 reading:
"The decedent had complete control, once the hose was passed to him, of the flow of gasoline into the tank."

2. That portion of paragraph 5 reading:
"A meter reading taken some time later indicated that fifty-eight gallons of gasoline had been delivered out of the storage tanks on the dock."

3. The first sentence of paragraph 6.

4. Those portions of paragraph 7 reading:
"That on a prior inspection, approximately one year before the accident, Captain Hansen found and reported the fishing boat to be in poor housekeeping, the wiring in poor condition and the boat to be generally filthy and dirty.

"At no time did Captain Hansen make an examination of the gas tank other than running his hand over the top of the tank and feeling the valves."

5. That portion of paragraph 8 reading:
"That the explosion and fire resulted from a defective condition of the gasoline tank of the fishing boat Santa Lucia."

6. All of paragraph 9.

7. Line one of paragraph 10.

Objection is further made to the alleged Conclusions of Law on the ground that said Conclusions are inconsistent with the Findings of Fact, the opinion of the Court filed herein, and the undisputed evidence produced at the trial of the instant action.

Libelants Propose the Following Additional Findings of Fact if the Proposed Findings of Respondent are Used

1. Insert at line 20, paragraph 3, the following:
"The dock attendent knew that the custom of fishing boats like the Santa Lucia was to request gasoline in an amount sufficient to fill the gasoline tank to capacity."

2. In the place and stead of the portion objected to in paragraph 4:
"That decedent controlled a spring type nozzle which could stop the flow of gasoline; that before any gasoline could flow to said nozzle, the Union Oil Company dock attendant Charles Caldwell was required to, and did, initiate the flow of gasoline from the gasoline storage tank located on the dock by turning two hand valves located dockside; that said dock attendant could

stop the flow of gasoline to said nozzle by two turns of said hand valves; that said Charles Caldwell could see the meter showing the quantity of gasoline delivered; that decedent could not see the meter; that the custom of the industry in supplying gasoline to a boat from which the operator could not see the meter was to shut off the gasoline when the amount requested was delivered; that said Union Oil Company dock attendant had the duty to watch the meter and inform the decedent of the reading and to cut off the supply of gasoline when the quantity ordered had been delivered; that gasoline was being delivered at a rate of approximately 5 gallons per minute; that said dock attendant carelessly did not look to see or inform the deceased of the amount delivered or of the fact that the ordered quantity had been delivered; that the neglect of the said dock attendant resulted in producing an excess quantity of gasoline of approximately 20 or 25 gallons with accompanying excess gasoline fumes, the loss of 4 or 5 minutes time for decedent and other members of the crew to clear the boat, the production of an explosive mixture of gasoline vapor in the hold of said boat, and thus proximately cause the death of Frank Cardinale."

3. In the place and stead of the portion objected to in paragraph 5:

"That said Union Oil dock attendant, after the gasoline fueling operation had been under

way for sometime, looked at the meter and observed a reading of about 20 gallons; that he did not look again at the meter until about 5 to 10 minutes later when he noticed that about 58 gallons had been registered on the meter."

4. In the place and stead of the first sentence of paragraph 6:

"The fishing vessel's gasoline tank had a maximum capacity of about 35 to 40 gallons."

5: In the place and stead of those portions objected to in paragraph 7:

All reference to the inspection approximately one year before the accident should be deleted.

Change lines 23 to 25 to read: "A complete visual inspection was made, and, in addition, Captain Hansen ran his hands over the top and bottom of the tank, felt and tested all fittings and valves, and detected no odor of gasoline."

6. In the place and stead of the portion objected to in paragraph 8:

"There is no direct evidence as to whether said vapors resulted from the escape of gasoline from defective dockside equipment of the respondent's or a gasoline tank leakage aboard the boat."

7. The word "following" should be omitted from line 3, paragraph 9.

8. In the place and stead of the portion objected to in paragraph 10:

"There is no direct evidence as to the condi-

tion of the meter, pipes and hoses therefrom to the Santa Lucia at the time of the accident."

9. The deceased Frank Cardinale was not guilty of any contributory negligence and the second defense of contributory negligence is untrue.

Libelants Do Not Believe the Proposed Findings of Respondent Should Be Used at All and Propose the Following Counter Findings

Findings of Fact

1. The allegations contained in paragraphs I, II, III, IV and V of the libel are true.

2. The deceased, Frank Cardinale, was not guilty of any contributory negligence and the allegations contained in the separate and distinct defense and plea of contributory negligence are untrue.

3. That, prior to the explosion aboard the Santa Lucia, a white flash occurred on the respondent Union Oil Company's dock, burning the face of the Union Oil Company dock attendant, Charles Caldwell; that this flash was witnessed by seaman Garret Ray from the deck of the tugboat Avila, approximately 50 feet away; that the Union Oil Company had exclusive control of said dock; that this flash resulted in and caused an explosion of gasoline fumes in the hull of the Santa Lucia; that the matter speaks for itself; that the fumes in the hull of the Santa Lucia were not ignited until after the ignition flash on the dock; that the dock and the instrumentalities thereof were under the exclusive

control of the respondent; that the ignition flash on the dock is an accident that does not ordinarily happen in the absence of negligence; that the ignition flash on the dock which preceded the explosion was not due to the voluntary act or contributory fault of the deceased.

4. That neither the libelants nor respondent have produced any evidence rebutting the doctrine of res ipsa loquitur, and the libelants have thereby established a prima facie case and an inference of negligence which remains unrebutted. The Court cannot decide whether the gases which accumulated in the hull resulted from defective equipment dockside or a failure in the gasoline tank aboard the boat. The ignition flash on the dock of the respondent proximately ignited the fumes in the hull regardless of the source of the fumes and proximately caused the death of the deceased.

5. That respondent further negligently supervised the fueling of the Santa Lucia; that respondent failed to observe, watch and control the quantity of gasoline moving from respondent's dock toward said vessel, permitted, negligently, more gasoline to move from said dock to said vessel than the quantity ordered, to wit, about 58 gallons instead of about 30 gallons, and failed to warn decedent thereof, depriving decedent of an opportunity to evacuate the vessel, and as a proximate and direct result of the foregoing caused the death of Frank Cardinale.

6. That libelants have been damaged in the sum of $.....

Conclusions of Law

That libelants are entitled to a judgment from respondent for the sum of $....., together with their costs of suit incurred.

Wherefore, libelants pray the proposed findings of respondent be rejected and the Court make findings in accordance with those submitted herewith.

MORGAN & BEAUZAY, and
MORTON L. SILVERS,

By /s/ MORTON L. SILVERS,
Proctors for Libelants.

[Endorsed]: Filed February 29, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO FILE OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Good cause appearing therefor, and upon Stipulation of the parties hereto,

It Is Hereby Ordered that libelants may have to and including February 13, 1956, within which to file objections to the proposed Findings of Fact and Conclusions of Law submitted by respondents.

Dated: January 19, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, United States
District Court.

[Endorsed]: Filed January 19, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO FILE OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Good cause appearing therefor, and upon Stipulation of the parties hereto,

It Is Hereby Ordered that libelants may have to and including February 29, 1956, within which to file objections to the proposed Findings of Fact and Conclusions of Law submitted by respondents.

Dated: February 14th, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, United States
District Court.

[Endorsed]: Filed February 14, 1956.

[Title of District Court and Cause.]

Michael J. Roche, District Judge.

MINUTE ORDER—MARCH 14, 1956

After arguments by respective counsel, Ordered that objections to Findings and the Proposed Findings stand submitted.

[Title of District Court and Cause.]

ORDER

The plaintiff has filed objections and amendments to the proposed findings of fact and conclusions of law of defendant and has proposed counter findings and conclusions of law; the court having considered the record before it hereby Orders that said objections and amendments be overuled and the proposed counter findings and conclusions of law be disallowed.

Dated: April 10, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District Court.

[Endorsed]: Filed April 10, 1956.

[Title of District Court and Cause.]

Michael J. Roche, District Judge.

MINUTE ORDER—DEC. 18, 1956

This cause came on this day ex parte for hearing on Respondents' motion to enter nunc pro tunc an

order setting aside the Findings of Fact and Judgment heretofore signed, filed and entered on January 30, 1956. Morton Silver, Esq., appeared for Libelants, and Fred Nave, Esq., appeared for Respondents. After arguments by respective counsel, It Is Ordered that said motion be, and the same is hereby, Denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named Libelants hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order Denying Libelants' Motion for Order Nunc Pro Tunc Setting Aside Findings of Fact, Conclusions of Law and Judgment thereon, made and entered on the 18th day of December, 1956, and from the whole thereof.

Dated at San Jose, California, this 12th day of March, 1957.

MORGAN & BEAUZAY, and
MORTON SILVERS,

By /s/ LUTHER CLARK,
Proctors for Libelants and
Appellants.

[Endorsed]: Filed March 13, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Libelant-Appellant herewith present the points upon which they claim the Court erred:

1. The District Court erred in allowing the judgment to be entered on January 30, 1956.

2. The District Court erred in refusing to enter a written order in conformity with its oral order of March 14, 1956, thus depriving Libelant-Appellant of due process of law by jeopardizing Libelant's rights of appeal, without knowledge of Libelant.

3. The District Court erred in denying the Libelant's Motion to enter an Order Nunc Pro Tunc setting aside findings of fact, conclusions of law and judgment thereon.

MORGAN & BEAUZAY, and
MORTON L. SILVERS,

By /s/ LUTHER A. CLARK,
Proctors for Libelants.

[Endorsed]: Filed March 13, 1957.

The United States District Court, Northern District of California, Southern Division

No. 27098—Admiralty

FRANCES CARDINALE, et al.,

Libelants,

vs.

UNION OIL COMPANY, et al.,

Respondents.

Before: Hon. Michael J. Roche, Judge.

Appearances:

For the Libelants:
ROBERT MORGAN, ESQ.
For the Respondents:
M. K. TAYLOR, ESQ.

SETTLEMENT OF FINDINGS

The Clerk: Cardinale versus Union Oil Company, settlement of findings.

Mr. Morgan: May it please the Court, I wish to thank the Court for giving us this time to argue the matter. With the importance of the matter it takes some time to actually argue the matter before the Court. Mr. Silvers called to my attention that by inadvertence, although the Court had signed orders extending our time within which to file objections and exceptions through the date that we filed them, that is, February 29th, by inadvertence the findings

had been signed and judgment entered, and in order to make this a proper proceeding I move the Court to set aside the findings of fact and judgment so that we may object to them.

The Court: No objection.

Mr. Taylor: No, no objection, Your Honor.

The Court: So ordered.

Mr. Morgan: Thank you. Your Honor, this case is quite familiar to the Court, and I am not going to bore the Court with a recital of the basic facts which I know the Court has in mind. The things I want to mention to the Court I want to mention in four different veins. First, it is our position that the findings of fact as submitted by the respondents do not correctly state the facts as set forth in the opinion. In [2*] this regard we feel that the findings of fact will not represent the trial court's opinion. For example, the trial court was very clear in its opinion that there was no evidence one way or the other as to where the gasoline escaped, and the exact words that the Court said were:

> "The crucial point is what was the condition of this equipment during the moments the gasoline escaped? Was the gasoline tank on the body leaking or was the equipment on the dock defective in some way? As to these points the record is silent."

With the opinion of the Court so expressed, findings of fact were submitted directly contrary:

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

> "That the explosion and fire resulted from a defective condition of the gasoline tank on the fishing boat Santa Lucia, and secondly that the fueling equipment on the dock was not defective."

which, of course, if this is the Court's opinion, makes it almost impossible to view the matter as we view the matter. In other words, we feel this way, that the trial court's opinion, which sets forth its thoughts, your opinion, Your Honor, states that upon this crucial point the record is silent and we have not upheld our burden of proof. That is, of course, one question.

Another question is to change it around as the defendants have or the respondents have and to say that the gasoline tank [3] was defective, the equipment on the dock was not defective, because those findings, if so made, will have a direct bearing upon the case, except that I believe the findings of the Court will ultimately reflect this Court's opinion rather than findings which counsel may wish the Court to make contrary to the Court's actual opinion of the facts.

There is one thing and I want to discuss it seriously because I feel that in arguing this case we failed to properly argue the case to the Court. First, I realize that if I can at this stage show the Court under the evidence as the Court finds it that we have established the case, it is not yet too late to receive judgment in this case. And I know the Court will not object to my urging for Mrs. Cardinale and her

children the legal theory which I feel we failed to thoroughly argue before the Court, and that is this. It is so simple that I uttered it only once during the trial. If Your Honor please, I said once during the trial to the Court, "Counsel for the respondent takes great delight in the fact that it may be the gasoline tank which is defective, and whether it was the gasoline tank that was defective or whether it was the dock equipment that was defective, in either instance, as I view the matter, as a matter of law, here the Union Oil is liable."

Why is that? Because if that is true, then we would be entitled to a judgment, because of this fact: There was a gasoline dock, there was a gasoline attendant, and taking [4] Caldwell's testimony alone, as a matter of law, if I understand the law correctly, there was a duty which was breached which proximately caused the death of Mr. Cardinale. What is that duty? It is the duty of a gasoline attendant, whether at a filling station or a marine dock, to so exercise ordinary care in the fueling of a vessel as to not cause the gasoline to overflow. I say that, and we quoted with that argument a case involving a gasoline tank which overflowed in the filling, a gasoline tank which overflowed in the filling both to retail automobiles and also by wholesalers to retail dealers. In other words, I would urge the Court this, that if Your Honor or I go into a gasoline station, and whether we say, "Give me 30 gallons," or whether we say, "Give me about 30 gallons," if the gasoline attendant, as in one case I cited to the Court, goes in back of this truck and

reads a comic book or goes into the station and neglects the operation, and if it overflows and there is an explosion and fire, then he is responsible for the damage.

Now, if the Court will find on this fact as we have requested in our findings, even if the Court disagrees with us on that point, then the point of law can be ruled upon, but without a finding as to whether there was a duty on the part of Mr. Caldwell to supervise the loading of this vessel, without a finding in that regard, then, of course, if the Court or if the Union Oil Company is wrong on their approach [5] to the law, then it would not be reviewed.

With respect to that issue I urge the Court that not only the cases but it is a matter of convenience that the person who goes in to get gas for his car, a highly dangerous substance, should have the right of supervision, but how much more here, Your Honor, when, as you found in your opinion, my client's husband could not see the meter? In other words, this dock was so constructed that my client's husband, now deceased, or any other person coming to that dock could not see how much gas was being put aboard.

The Court: But he had control of the nozzle.

Mr. Morgan: Yes; Your Honor, but——

The Court: And coupled with that there was no spillage.

Mr. Morgan: May I just pose this to Your Honor: The fact that the particular harm, the spillage type of harm which the Court thinks of im-

mediately as loading too much, does not take place but another type of harm takes place, does not remove the proximate causation.

Let me also suggest that the mere fact that a person loading gasoline in a car or a boat holds the nozzle does not free the person who can see the meter from turning off the two valves which turned the gasoline on, and whether or not he controlled the nozzle, isn't there a duty of care on the part of Mr. Caldwell to inform Mr. Cardinale that 20 gallons had been placed aboard the ship, which he didn't do, and isn't [6] there a further duty to inform him that you have taken 30? Why have the meter? As the Union Oil use it the meter is there only to determine the charge. As we view it the meter is to determine the volume.

If Your Honor please, we had a great deal of testimony as to the custom in the marine industry. We brought in fishermen. Defendants brought in a member of so-called fire protection committee, which as I view it, it is a committee to keep down financial losses of another company, a man who would certainly be biased in his testimony, and his testimony as to his motorboat would hardly be decisive as to the custom in the fishing industry, and if the custom, aside from the control of it, if the custom was, as was testified by all the fishermen who testified, if the custom was that the dockside attendant who can see the meter would cut off the supply of gasoline as requested, then wasn't Frank Cardinale entitled to the proper performance of that custom rather

than to a breach of that custom that Caldwell unashamedly admitted that he did? How would that affect it? In this case, as I view it, it deprived my client's husband of between four and five minutes to evacuate the boat and save his life. We know according to the testimony, although the findings do not report it, and we ask the Court to so find, that approximately five gallons a minute is loaded from that gravity flow tank, and if that is the case, if the capacity was 35 to 40 gallons loaded, then had my [7] client been told when the 30 point was reached, and had he been given a chance to note that the tank was not filling, if that is what happened, then my client would have gotten a wooden pole, tested the depth of that tank, determined that the gasoline was not in it, and given a warning to the crew and had an opportunity himself to be alive this date. I say a gasoline dock attendant is more than a cashier. He is a specially trained person. Mr. Caldwell, I urge the Court, had certain positive duties to my client. If that argument does not appeal to the Court, then of course all I can ask for is to find contrary to my argument. I mean I hope I have not misrepresented the facts. I think what I have said factually is correct. But if the legal import of the facts I have represented to the Court is incorrect, even if the facts are found as I honestly believe the record shows them, then if my position is correct we can have some remedy.

If Your Honor please, as far as the doctrine of res ipsa goes, res ipsa loquitur, again we did not make our point on that particular doctrine because it was our point that a flash fire occurred on the

dock, not that res ipsa compelled the finding that the gas came from the dock. We wanted to make the point that whether the gas came from the tank, which we did not think it did, or from the Lompac, which we thought it might have, that if the fire occurred on the dock, which was an instrumentality exclusively in the control of the respondents, [8] if this was the case, and if a flash fire occurred on the dock, since that is not the sort of thing that ordinarily occurs, and since our client would ordinarily have nothing to do with the flash fire, that the flash of the fire which ignited the hold would be the responsibility of Union Oil.

In this regard there was not mentioned in the respondents' facts submitted to the Court the fact that there was a white flash seen first, followed a second or two later by the explosion which Mr. Rowe testified to. There wasn't mentioned in Mr. Pedrizi's testimony that Mr. Caldwell grabbed or turned and ran to the rear and grabbed this red object, which we thought was the fire extinguisher, and there was not mentioned the fact that Mr. Caldwell suffered the burns about his face, which we feel are very important, because this white flash which hit Mr. Caldwell on the dock was a flash fire which originated on the dock. If we think only of the gasoline tank erupting, where would the fumes be? Just in the hull of the vessel. How then could Mr. Caldwell have had his face seared by this white flash which hit him and spun him around? He might have been hit by an object, but for a flash fire to have engulfed the dock, as the testimony showed, then we think from that fact the Court may—I do not think

the Court is compelled to by any chance—but we think the Court may reasonably conclude that the flash originated on the dock exclusively in Union Oil's control. [9]

But whether the Court concludes in that regard or not, and we realize that the Court's opinion is fully justified—I mean I would not argue about the opinion with the Court for, as the Court said in its opinion, "I don't know where the gas came from, whether it came from the gas tank or the dock," because that is an opinion which is an opinion which frankly I myself for many months had not made up my mind about. But we do feel that beyond the opinion, and unexpressed in the opinion, and we ask the Court's thought and opinion in the findings, is, one, the fire started on the dock regardless of where the gas came from and, two, Caldwell owed a duty to warn Cardinale about the quantities and volume of gas going aboard, and his failure to give him any warning deprived him of time, which cost him his life.

I did find, in addition to the cases which I phoned to the Clerk following my argument, a case which on a question of causation I would think would be of some importance. The case is the case of Johnson versus Commerce Portland Cement Company, 64 Federal 2nd, 193, which is a Sixth Circuit Court decision. In that case some people were working in the hold of a ship where there was gas, and lightning struck and exploded the gas and killed everybody in the hold of the ship, and the question was one of proximate causation. Should they have, when they knew the gas was there, should they have

reasonably foreseen that lightning could strike or something could have happened [10] to explode it, and the Circuit Court quoted Section 310 to the effect that if the actor's conduct is a substantial factor in bringing about the other's injury, the fact that the actor had not foresaw or should have foreseen the extent of injury or the manner in which it occurred does not prevent him from being liable.

I feel that Mr. Cardinale should have foreseen. If a man asked for 30 and, as I understand it, there is some testimony with respect to custom when you ask for gasoline, but he should have foreseen at least spillage on the deck. In other words, if you give more than you have been asked for, at least it should have been foreseen. The Court will agree with me on that. And the mere fact that in this case instead of spilling on the deck, that some of it went below, if we assume that to be the fact, the mere fact that that particular type of thing was not foreseen by him does not prevent him from being legally responsible to Frances Cardinale and the children if it caused the death of Frank Cardinale. And on the testimony of Caldwell alone I would feel that there is liabillity on the part of Union Oil, and I am not going to quarrel with the Court's opinion with respect to the preponderance of proof, because I know that the Court listened intelligently to a mass of testimony which sometimes bored me about the Lompac and about the gasoline tanks, the inspections, and so forth, but based upon the simple facts, which I ask the Court to find, and I want to [11] repeat them in closing, I

ask the Court to find on these facts, and after reconsideration, if the Court feels that these facts as a matter of law require a recovery on the part of my client, to enter an appropriate sum for my client, and in summary they are, one, the flash fire did occur on the dock, and there is the testimony of a number of people which I mentioned and inferences; two, Thomas Caldwell had a duty imposed by law by the custom of the industry to inform Frank Cardinale when the amount requested had been delivered and he did not do that. That resulted in Frank Cardinale being deprived of four to five minutes' time, during which time his life would have been saved. I know if the Court agrees with me, the Court will have no fear in ordering judgment for my client. The mere fact that the opinion did not consider this argument before certainly would not hold the Court back, because I know the Court is going to give the decision the way he thinks it. But I ask the Court not to sign the findings submitted by the defendant which are squarely contrary to its opinion, even though it may make the judgment, perhaps nail the lid down tighter on the libelant. Thank you very much for giving me this time and for the Court's courtesy.

Mr. Taylor: May it please the Court and Mr. Morgan, Your Honor, the argument which counsel has just made was the type of argument that was made before the case was submitted. It was an argument on the facts that was made to the Court [12] during the closing arguments, I believe while the argument has been made, it is not proper at this time because it is not on the objections to the findings

that have been submitted by counsel, and the amendments that they have proposed.

Your Honor, when we prepared the findings in this case we went down Your Honor's memorandum opinion almost word for word, and I have taken the trouble here to underline the findings of facts that have been complained of as against the objections that have been made, and only in one or two cases has there been one or two words either added for the purpose of clarification or explanation. For example, the first objection was that in paragraph 4, that these gentlemen—this is the wording that they objected to—that these gentlemen had complete control once the hose was passed to him of the flow of gasoline into the tank. On page 2 of Your Honor's opinion there is almost the identical wording. These gentlemen had complete control once the hose was passed to him of the flow of gasoline into the tank. I do not think there are any objections that have been cited—there are seven, I believe—I do not think any of those seven objections have any foundation in fact as objections, because they follow Your Honor's memorandum opinion almost identically, word for word. We did that intentionally as to the findings of fact that have been complained of. We in that regard followed Your Honor's memorandum opinion almost word for word. There [13] were a few words added for clarification, but certainly none of the findings of fact that we asked Your Honor to sign deviate from or are in any way different from the findings as found in Your Honor's memorandum opinion.

Answering counsel's argument about the fact that the fire started on the dock, that is a question of fact. There was testimony—I do not recall any particular witness having testified just exactly where this fire did start, whether it started on the boat or whether it started on the dock. I do not recall of any testimony directly on the point, and I think Your Honor so indicated in the memorandum opinion. The closest witness to the scene who was looking directly at the scene—there were two of them—one was Caldwell himself and the other one was a seaman Ray. Seaman Ray testified that he saw this flash and it came from the direction of the dock and the Santa Lucia. He was standing in such a position where he was looking directly at the stairs of the Santa Lucia and at the dock at the same time. I mean the Santa Lucia was portside, too, and he could take in his vision that entire scene, and he said the flash and explosion came from that direction and he could not pinpoint it as to whether it was on the boat or whether it was on the dock. Mr. Caldwell says he was looking over, he was standing on the dock looking over the side, watching Frank Cardinale take the sounding stick and place it into the fuel pipe; he was looking directly at it, and [14] he received the full force of this blast in his face. There were burn marks on his face. He had some burn pock-marks on his chest. He had no such burn marks about the back of his head or the back of the T shirt that he was wearing. There is a conflict—I will admit there is a conflict with one of the seamen who said that he saw Caldwell make a turn, step

back and make a turn. That is conflicting testimony, and Your Honor has found already in favor of the respondents, which would include the finding that the flash fire did not occur on the dock, and therefore Your Honor has already decided that point on the conflicting testimony, and I do not think Your Honor now, just in view of the argument here, that Your Honor should find that the fire started on the dock, that Your Honor will do so. The burden was upon the libelants to prove by a preponderance of evidence that the fire did start on the dock, and as Your Honor points out, they failed in that burden. These are apparently the only two points relied upon by counsel, although they have enumerated more in their objections and proposed counter findings.

The other is with reference to the duty owed by Charles Caldwell, the attendant. That, too, in our opinion, the duty with reference to the custom was something that there was conflicting evidence upon, as to whether or not, or just exactly what the custom was. There was testimony that when a person ordered a certain amount, that was more for the purpose [15] of a sale, that was more for the purpose of determining whether or not they had their credit to purchase that amount, and inasmuch as the recipient of the sale had full control over the nozzle, it was up to the recipient of the gas to turn it off when they felt that they had an adequate amount, that there was no duty upon the vendor, the attendant, to stand there and watch the meter, and the instant it reached a certain figure to turn it off.

There was conflicting evidence on that point, and Your Honor made no finding as to custom and we do not believe that custom in this case was material, as to just what the custom was. We do not believe that that is a material finding. It was not mentioned in the memorandum opinion and we did not include it one way or the other in the proposed findings, and we would object to it being added to the proposed findings, because we do not believe it is material.

I am not familiar with the case cited by counsel with reference to the lightning striking the ship, but I am sure Your Honor did review the cases that were cited by both respondent and libelant in coming to the conclusion that Your Honor did. Your Honor found after hearing the evidence pro and con for many days that there was no responsibility on the respondents, there was no proof of any negligence on their part, and Your Honor so indicated in the memorandum opinion. Thank you.

Mr. Morgan: May it please the Court, we are of one mind, [16] then, because as I understand counsel's statement, he says that the findings were taken from your opinion, and I will concede that. I do not think the Court intended to draw findings when it wrote its opinion, and I think it is clever of respondents to adopt the opinion as findings.

The Court: Not necessarily. You are not limited to my opinion. It goes to the evidence of the case.

Mr. Morgan: As I understand the Court's opinion, though, the Court's opinion is just the way I quoted it to the Court: Was the gasoline tank on the boat leaking or was the equipment on the dock

defective in some way? And the Court said, "As to these points the record is silent." The respondent presented findings of fact squarely contrary to that recital. The Court was asked to find, one, the gas tank was defective, and, two, the equipment on the dock was not defective, and that finding will take persuasion of your mind subsequent to the opinion.

The Court: I concluded it could not be otherwise.

Mr. Morgan: Right.

The Court: To be perfectly frank with you.

Mr. Morgan: All I wanted to do was to make sure the findings were the Court's opinion, because it would be so easy to take an opinion in the respondent's favor and to draft findings that would favor the opinion that might not be the trial court's opinion, and if the Court's opinion is that, then I am left with just two major arguments: First, [17] the argument that I made that there was no finding as to custom. Counsel concedes that, and the Court's opinion does not cover that, nor does it cover the duty of the gasoline attendant, nor does it cover the issue as to whether there is proximate causation between the escaping in the hold rather than going out on the deck, and I would ask the Court to write an opinion, after due consideration of those points, and I think the Court will—I hope the Court will, considering those points which are not covered in the opinion, conclude with me that there was a custom.

The Court: Did you draw up some findings in that respect?

Mr. Morgan: Yes.

The Court: Read them, with respect to custom.

Mr. Morgan: With respect to custom we offered the proposed finding on page 2, lines 16 through 18. The dock attendant knew the custom of fishing boats like the Santa Lucia was to request gasoline in amounts sufficient to fill the gasoline tank to capacity, and on the same page, line 26, that decedent could not see the meter, that the custom of the industry in supplying gasoline to a boat from which the operator could not see the meter was to cut off the gasoline when the amount requested was delivered, that the Union Oil Company dock attend- and had the duty to watch the meter and inform the decedent of the reading and cut off the supply of gasoline when the quantity ordered had been delivered. [18]

The Court: What was the case that you cited?

Mr. Morgan: I cited Sanders vs. Austin, 180 Cal. 664; Weaver vs. Shell Oil Company, 34 Cal. App. 2nd, 713, and Pinter vs. Wenzel, 180 Northwestern 120, and finally the last case was Standard Oil vs. Evans, 122 Southern 735. All of those cases are directed to the positive duty of a gasoline attendant to prevent the overflow of gasoline, and the lightning case, the Court did not get the citation on that, that lightning case was 64 Federal 2nd, 193.

The Court: I will check those cases.

Mr. Morgan: Thank you very much for your courtesy. There is one thing I forgot and that is, there was no finding on the defense of contributory

negligence which, of course, if there is no negligence, you would not actually have to find on the matter, but the libelant would appreciate a finding if the Court will give us a finding in that regard.

The Court: The matter stands submitted.

Mr. Taylor: Your Honor, may I make this one observation on the contributory negligence. I will agree with counsel that if there is no negligence found, it is not necessary to make a finding, but I do not think it is material in this case to make a finding on contributory negligence. I would like to remind your Honor that there are other cases pending, and it may have some bearing on this. What it may be I do not know, but I do not think it is necessary for a finding to appear on [19] contributory negligence in this particular case.

Mr. Morgan: In answer to that, I feel whatever judge who tries any other cases, or for that matter, if your Honor tries the other cases, that your Honor—in other words, if you will cover this defense which was before you, then whoever hears it will have the benefit of that decision.

The Court: Let us pause for a moment. Where is the contributory negligence?

Mr. Morgan: I do not see any.

The Court: I will have to so find.

Mr. Taylor: The only element on contributory negligence was the fact of possibly poor housekeeping aboard the boat. There was evidence that prior to this date there was poor housekeeping aboard the boat. You will recall the marine surveyor's testimony, and it is in the finding, that there

had been poor housekeeping, dirty and filthy conditions.

Mr. Morgan: We do not object to that, but that is not negligence nor a defense. In other words, maybe a year before things were dirty, but there is no contributory negligence anyway.

The Court: I do not think there is any necessity of making a finding on that under the facts and testimony in relation to the issues involved.

Mr. Morgan: Of course, if the Court decides in our favor after reviewing the cases, the Court will have to decide that [20] issue.

The Court: I wish I could.

Mr. Morgan: I pray the Court will when it reads those cases.

The Court: If I thought you could sustain your theory of your case, I would have no hesitancy at all in giving you judgment. I concluded that you did not. However, I will check those cases.

Mr. Morgan: I would greatly appreciate it.

Mr. Taylor: Thank you, your Honor. [21]

[Title of District Court and Cause.]

Appearances:

For the Libelants:
MORTON L. SILVERS, ESQ.
For the Respondents:
FREDERIC G. NAVE, ESQ.

HEARING ON LIBELANT'S MOTION TO ENTER AN ORDER NUNC PRO TUNC SETTING ASIDE FINDINGS OF FACT, ETC.

December 18, 1956

Mr. Silvers: Your Honor, I am appearing here this morning to request the issuance of an order nunc pro tunc to make a matter of record at this date an order which your Honor made in open court on March 14th in the case of Cardinale vs. Union Oil, in which the judgment prematurely entered as of that date, and the findings, were set aside in order that your Honor might hear the proposed counter findings and objections to the findings on behalf of libelants. Your Honor granted that motion.

Mr. Taylor of Boyd & Taylor, for the respondent Union Oil Company, who is in court this morning, was in court on March 14th, according to the reporter's transcript, which I have given the Court a copy of, and had no objection at that time to the issuance of the order.

The purpose of my request is simply to make a matter of record now what was apparently not entered on March 14th of this year.

Mr. Nave: May it please the Court, we will object to the entry of the order as requested. The record of the Clerk's office of this Court shows that a judgment was entered on January 12, 1956. That was the judgment your Honor entered denying recovery. Following that there was a judgment on the findings, which was entered on January 30th. And at the time of a hearing on the findings of fact, in which Mr. Silvers and his associate objected to the findings and proposed counter [2*] findings, Mr. Taylor, of our office, agreed that these objections, these findings, might be argued, but the record does not reveal, nor was there any stipulation, that the judgment was to be set aside. It is our position there has been and was a final judgment entered in this case on January 30th by your Honor, and also the judgment that was entered on the 30th was merely on findings. We want the record to show that it is our position that a final judgment has been entered in this court on January 12, 1956, and that no order or judgment nunc pro tunc is required or necessary because of the fact the record reveals that a final judgment was duly entered on January 12, 1956.

The Court: Mr. Silvers, did he recite the facts as they exist in the record?

Mr. Silvers: No, sir, I don't believe so. I am including in the record the transcript of the proceedings on March 14th, and I don't think his recital was correct in that regard. I am quoting now from the transcript: "I move the Court to set aside the findings of fact and judgment so we may object to

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

them. The Court: No objection? Mr. Taylor: No, no objection, your Honor. The Court: So ordered."

The Court: What occurred following that?

Mr. Silvers: The only matter of record following that was the issuance of an order of this Court overruling the proposed counter findings and objections. But there was no [3] entry of judgment following March 14th, when the prior judgment was set aside upon motion and stipulation, or at least lack of objection, on the part of the respondent.

The Court: Well, I have the record here, and judgment was entered on January 30th, wasn't it?

Mr. Silvers: Your Honor probably also sees in the record the issuance of order based upon stipulation between respondent and libelant, granting the libelant time to file objections until February 29, 1956. I submit that any judgment that was entered was obviously prior to that date. The motion referred to the judgment, and in the transcript, which I have provided, the motion was made for the Court to set aside the judgment, and the Court so ordered on March 14th. The Court did not order findings set aside. It says that in express terms in the reporter's transcript. I don't think we should be precluded merely because of a clerical oversight. There was no judgment filed after your Honor's order setting the prior judgment aside.

The Court: I have checked the record. Your motion will have to be denied.

[Endorsed]: Filed April 25, 1957. [4]

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, Southern Division, do hereby certify that the foregoing documents are the originals filed in this court in the above-entitled case and that they constitute the record on appeal herein designated by the attorneys for the appellant:

Libel in Personam.

Petition for Guardian, Ad Litem.

Answer to Libel.

Memorandum Opinion.

Findings of Fact and Conclusions of Law.

Judgment on Findings of Court.

Objections and Amendment to Proposed Findings.

Order Extending Time to File Objections, Jan. 19th, 1956.

Order Extending Time to File Objections, Feb. 14th, 1956.

Minutes for March 14th, 1956.

Order overruling objections and amendments.

Minutes for Dec. 18th, 1956.

Notice of Appeal.

Statement of Points on Appeal.

Designation of Contents of Record on Appeal.

Deposition of Charles H. Caldwell and James B. McMillan.

Deposition of Lester C. Johnson, 2 volumes.

Deposition of James E. Hill.

Reporter's Transcripts for Dec. 19, 1955; Nov. 30, 1955; Dec. 6, 1955; Dec. 8 and Nov. 28, 1955.

Reporter's Transcripts, March 14, 1956, and Dec. 18, 1956.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 25th day of March, 1957.

[Seal] C. W. CALBREATH,
Clerk;

/s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15492. United States Court of Appeals for the Ninth Circuit. Frances Cardinale, Ann F. Cardinale, Horace A. Cardinale and Frank J. Cardinale, Minors, by Frances Cardinale, Their Guardian, Ad Litem, Appellants, vs. Union Oil Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 25, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.